

1 Hon. Sara J. Agne
2 Chair, Rule 5.4 Working Group
3 3131 W. Durango Street
4 Phoenix, AZ 85009
5 602.506.8288

6
7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-19-_____

10 **PETITION TO AMEND RULE 5.4**
11 **OF THE ARIZONA RULES OF**
12 **CIVIL PROCEDURE**

PETITION

13 Pursuant to Rule 28, Rules of the Arizona Supreme Court, the Rule 5.4
14 Working Group (“Petitioner”)—a statewide body comprised of county court
15 clerks, lawyers, judges, and court operations and administrative professionals¹—
16 respectfully petitions this Court to modestly amend Rule 5.4 of the Arizona Rules
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19 ¹ Rule 5.4 Working Group members include the Hon. Peter B. Swann, Vice Chief
20 Judge of Division One of the Arizona Court of Appeals; the Hon. Cynthia T. Kuhn,
21 Judge of the Pima County Superior Court; Hon. Donna McQuality, Clerk of the
22 Yavapai County Superior Court; John W. Rogers, Staff Attorney, Arizona
23 Supreme Court; Jessica J. Fotinos, Court Operations Administrator for the Clerk of
24 the Maricopa County Superior Court; Donna Hall, Public Records Manager for the
25 Clerk of the Maricopa County Superior Court; Chris Driscoll, Operations Project
Manager for the Clerk of the Maricopa County Superior Court; James Bowen,
Assistant Arizona Attorney General; George H. King, Partner at Lang & Klain,
PC; Keith Kaplan, Civil Court Administrator for the Maricopa County Superior
Court; and the undersigned.

1 of Civil Procedure. The amendments would add a new definition and a new
2 subsection (i) to govern the procedure for placing a case-initiating document, such
3 as a complaint, under seal. A blackline of the proposed amendments is attached at
4 Appendix A, and a clean version of the proposed amendments is attached at
5 Appendix B.
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7 **I. BACKGROUND AND FORMATION OF RULE 5.4 WORKING**
8 **GROUP**

9 Rule 5.4 was recently enacted upon this Court’s Order, effective January 1,
10 2018, and was intended to provide a uniform, state-wide procedure for sealing and
11 unsealing documents. The Petition recommending adoption of Rule 5.4 originated
12 from the State Bar of Arizona’s Civil Practice & Procedure Committee (“CPPC”).
13 *See* Petition R-17-0007.
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15 As can be expected with any new rule, certain practicalities arose with the
16 rule once effective—particularly with regard to the duties assigned by the rule to
17 clerks of the superior court. As a result, representatives of the Arizona Association
18 of Superior Court Clerks approached the CPPC in Fall 2018, identifying a number
19 of implementation challenges experienced by the court clerks. At its October 2018
20 meeting, the CPPC voted to establish a joint Rule 5.4 Working Group, comprised
21 of members of the CPPC as well as judges, superior court clerks, and other court
22 system representatives, to study and develop solutions for the identified concerns.
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1 The Rule 5.4 Working Group has worked diligently since October 2018 to develop
2 solutions to the identified concerns with resources to be made available to judicial
3 officers, superior court clerks, the Bar, and the litigating public. In addition to the
4 amendments proposed in this Petition, these resources include a checklist for those
5 seeking to file documents under seal, and a proposed form of order showing Rule
6 5.4(c)-compliant findings.
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8 One area of concern, addressed by this Petition, relates to the use of Rule 5.4
9 to file case-initiating documents under seal. Perhaps simply by virtue of Rule 5.4's
10 enactment and publication, superior court clerks have of late encountered more
11 parties attempting to file case-initiating documents under seal—a situation that
12 existing Rule 5.4 does not explicitly address. *See* Ariz. R. Civ. P. 5.4(a) (directing
13 the rule's general focus to "an unsealed civil action," in other words, an action that
14 was initiated by an unsealed case-initiating document). To assist in addressing
15 those instances, Petitioner proposes the addition of one new definition and one new
16 subsection to Rule 5.4.
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20 **II. OVERVIEW AND SUMMARY OF PROPOSED CHANGES**

21 While Rule 5.4's promulgation in 2018 answered the long-posed practical
22 question of how to properly file a document under seal in an unsealed civil action
23 in Arizona superior court, it did not specifically address what has become a
24 growing practice of parties seeking to file case-initiating documents under seal. To
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1 fill this gap, Petitioner first proposes to define the term “case-initiating document”
2 in subsection (b) to mean “the complaint or other document that a party files with
3 the court to commence a civil action.”
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5 The Rule 5.4 Working Group also proposes the following procedure in a
6 new subsection (i):

7 (1) A party seeking to file a case-initiating document under seal must
8 first file a publicly accessible version of such a document, which allows
9 the superior court clerk to assign a case number and judicial officer to the
10 civil action as well as ensure that court administration is able to process
11 the matter efficiently as a new case.
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13 (2) After filing a publicly accessible version of such a document,
14 which is required by the proposed rule to be “a version of the document
15 the party ultimately wants to file under seal with redactions covering the
16 portions of the document that are subject to the motion or stipulation,”
17 the party or parties may file a publicly accessible motion or stipulation to
18 file under seal the more fulsome case-initiating document that they wish
19 to have sealed.
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22 (3) The proposed subsection also makes clear that the existing
23 requirements of (c), (d), and (e) of Rule 5.4 apply to requests to seal
24 case-initiating documents and must be adhered to. (These requirements
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1 are the proposed-order, motion-or-stipulation, and lodging provisions of
2 Rule 5.4.)

3 (4) Finally, the proposed subsection provides the procedure for parties
4 to follow when a request to seal a case-initiating document is completely
5 or partially denied by the superior court, which mirrors the seven-day
6 procedure from existing Rule 5.4(f). If the court completely or partially
7 denies the request to seal the case-initiating document, and if the party no
8 longer wishes to prosecute the action due to that ruling, the requesting
9 party or parties must act to secure a Rule 41, Ariz. R. Civ. P., dismissal
10 of the action no later than 7 days after the entry of the complete or partial
11 denial. The proposed amendments note that options under Rule 5.4(f)(1)
12 then continue to remain available to a party whose request to seal a case-
13 initiating document is completely or partially denied by the court. They
14 also remind parties who have such a request partially granted that those
15 parties must comply with Rule 5.4(c)(3)(B)(i), which requires that those
16 parties file a publicly accessible version including only those redactions
17 approved by the court.
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23 **III. RATIONALE**

24 As noted in Petition R-17-0007, which led to this Court's enactment of Rule
25 5.4, Arizona has the substantive law on point providing that requests to seal case-

1 initiating documents should be rarely made and even more rarely granted. The
2 practical experiences of superior court clerks this year, however, have borne out
3 that a procedure for when a person does choose to make such a request is lacking.
4 The amendments proposed herein would remedy that lack, yet emphasize the
5 import of constitutional law disfavoring such requests. *See Nixon v. Warner*
6 *Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); ARIZ. PRAC., TRIAL HANDBOOK FOR
7 ARIZ. LAWYERS, § 2:20 (“Public access to judicial proceedings”) (quoting *State v.*
8 *Tucker*, 231 Ariz. 125, 131 (App. 2012)); *see also Phoenix Newspapers, Inc. v.*
9 *Superior Ct.*, 140 Ariz. 30 (App. 1983) (“*PNI I*”); *Phoenix Newspapers, Inc. v.*
10 *Superior Ct.*, 180 Ariz. 159 (App. 1993) (“*PNI II*”). The substantive law provides
11 that before a case-initiating document may be sealed, a trial court must “balance
12 the presumption that information received by it is to be open to the public against”
13 the particular request for sealing—in view of the multi-factor test set forth in Rule
14 5.4(c). *Cf. PNI I*, 140 Ariz. at 36.

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19 On the road to Rule 5.4’s promulgation, the State Bar and this Court also
20 examined parallel local rules on sealing practices from the federal trial court for the
21 District of Arizona, as well as from other states. The local federal rule most closely
22 addressing requests to seal case-initiating documents is LRCiv. 5.7,² which
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1 provides that even fully sealed actions in federal court have already been assigned
2 a case number and are part of the electronic record. Without proposed Rule
3 5.4(i)(1)'s requirement of a publicly accessible version of a case-initiating
4 document, lodged case-initiating documents remain unfiled until the trial court
5 rules on the request, delaying or preventing a number of practical tasks superior
6 court clerks undertake when an action commences. *See* Rule 5.4(e)(3), Ariz. R.
7 Civ. P. And, without a publicly accessible version of a case-initiating document
8 filed, the likelihood that a request actually gets ruled on is also remote, as
9 assignment to a division of the superior court is itself one practical task that may be
10 delayed. Further, absent a publicly accessible version of a case-initiating document
11 having been filed in and docketed, court administration also encounters issues
12 relative to automatic notices and similar items being issued promptly, potentially
13 delaying the administrative processing of the case overall. Petitioner seeks to end
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19 LRCiv 5.7

20 **FILING OF COURT RECORDS IN SEALED CIVIL ACTIONS**

21 Every document to be filed in a sealed action must be submitted to the
22 Court in paper form with a cover sheet prominently displaying the
23 notation "DOCUMENT SUBMITTED UNDER SEAL" and clearly
24 identifying the document, the number of pages submitted, and *the*
25 *case number and title of the action* in which the document is to be
filed.

(Emphasis added.)

1 that limbo for lodged case-initiating documents by requiring a publicly accessible
2 version of such documents—before such disfavored requests may even be made.

3 **IV. CONCLUSION**

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5 The combined experiences of Petitioner’s members have shown that there
6 continues to be a growing practice of parties seeking to file documents—including
7 case-initiating documents—under seal. Substantive constitutional law, both
8 federally and in Arizona, disfavors indiscriminate and widespread sealing—
9 particularly of entire civil actions. Additionally, from a practical perspective, a
10 lodged case-initiating document occasions a Schrödinger-esque situation where a
11 case number and judicial officer may not be assigned until the court rules on the
12 request to seal such a document, but if the court did rule, there is yet no case
13 number in which to file the ruling.
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16 Petitioner’s proposed small amendments to Rule 5.4 would both clearly
17 adhere to the law regarding such requests and ease the actual procedures for
18 handling them when they do arise. In Rule 5.4’s tradition of a uniform,
19 substantively proper, procedural rule to assist courts, clerks, and parties in dealing
20 with these recurring issues, Petitioner respectfully requests that the Court amend
21 Rule 5.4 to adopt a definition of “case-initiating document” in subsection (b) and
22 add a new subsection (i) to address requests to seal case-initiating documents.
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1 RESPECTFULLY SUBMITTED this __8th__ day of ____January____, 2019.

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4 /s/ Sara J. Agne

5 Hon. Sara J. Agne
6 Chair, Rule 5.4 Working Group
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9 Electronic copy filed with the
10 Clerk of the Arizona Supreme Court
11 this __8th__ day of ____January____, 2019.

12 by: ____/s/ Sara J. Agne____
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